

ROBIN B. JOHANSEN, State Bar No. 79084
THOMAS A. WILLIS, State Bar No. 160989
REMCHO, JOHANSEN & PURCELL, LLP
201 Dolores Avenue
San Leandro, CA 94577
Phone: (510) 346-6200
FAX: (510) 346-6201

Attorneys for Defendants San Francisco Unified
School District, San Francisco Board of Education,
City and County of San Francisco, Eric Mar, Mark Sanchez,
Jane Kim, Kim-Shree Maufas, Norman Yee, Jill Wynns,
Hydra Mendoza, Carlos Garcia, Dan Kelly and Sara Lipson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ANDREA ESQUIVEL, et al.,

Plaintiffs,

vs.

SAN FRANCISCO UNIFIED SCHOOL
DISTRICT, et al.,

Defendants.

) No.: CV 07 5709 MHP

) **DEFENDANTS' REPLY IN SUPPORT**
) **OF MOTION TO DISMISS; REQUEST**
) **FOR DECISION ON THE PAPERS**

) Hearing:

) Date: April 21, 2008

) Time: 2:00 p.m.

) Crtrm.: 15

(The Honorable Marilyn H. Patel)

1 Plaintiffs' opposition to defendants' motion to dismiss was due Monday, March 31,
 2 2008, but to date they have filed nothing. Therefore, defendants respectfully request that the Court
 3 grant the motion to dismiss based on the papers submitted by them and take the hearing set for
 4 April 21, 2008, off calendar.

5 Although plaintiffs' failure to file an opposition brief may not by itself be grounds for
 6 granting the motion, this case has always been one that should be dismissed at the outset.¹ The United
 7 States Supreme Court and Ninth Circuit could not be clearer that the First Amendment plays no role in
 8 disputes over curriculum decisions made by local school districts. *See Rosenberger v. Rector*
 9 *& Visitors of the Univ. of Va.*, 515 U.S. 819, 833-34 (1995); *Downs v. Los Angeles Unified Sch. Dist.*,
 10 228 F.3d 1003, 1013 (9th Cir. 2000). Plaintiffs have no more of a constitutional right to insist that the
 11 San Francisco Board of Education continue offering JROTC than other students have to a course in
 12 pacifism or cinematography.

13 All curriculum decisions are by their nature content-based choices. Each school day has
 14 a limited number of hours, and a decision to teach one thing means not being able to teach something
 15 else. Offering a course in economics may mean not being able to offer medieval history, and selecting
 16 a science book highlighting genetics may mean passing on one that emphasizes global warming.

17 Even though those decisions are difficult and sometimes even contentious, the courts
 18 have made clear that the First Amendment cannot be deployed as a weapon in those battles. The
 19 reasons are many and obvious. The First Amendment ensures that governments do not unduly limit
 20 the right of others to speak, but it does not limit the government's ability to speak, such as deciding
 21 what to teach in public schools. Moreover, to inject the First Amendment in this area would transform
 22 federal courts into de facto school boards, saddling those courts with difficult pedagogical and political
 23 decisions that are best left to elected officials. Courts would also lack any judicially manageable
 24 standards, and schools would be required to offer an unlimited menu of academic choices, with
 25 personalized curricula that no school district could begin to afford.

26 ¹ Given the frivolous nature of the underlying claim, plaintiffs' failure to prosecute it efficiently, and
 27 the significant attorney's fees defendants have incurred in this case, defendants reserve the right to
 28 seek sanctions and/or attorney's fees from plaintiffs.

1 For all these reasons, courts have held that the First Amendment simply does not apply
2 to a school district's curriculum choices. Plaintiffs' case therefore must be dismissed.

3 Dated: April 7, 2008

Respectfully submitted,

4 ROBIN B. JOHANSEN
5 THOMAS A. WILLIS
6 REMCHO, JOHANSEN & PURCELL, LLP

7 By: /s/ Thomas A. Willis
8 Thomas A. Willis

9 Attorneys for Defendants San Francisco Unified
10 School District, San Francisco Board of Education,
11 City and County of San Francisco, Eric Mar, Mark
12 Sanchez, Jane Kim, Kim-Shree Maufas, Norman
13 Yee, Jill Wynns, Hydra Mendoza, Carlos Garcia, Dan
14 Kelly and Sara Lipson

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